Lembaga Kemajuan Johor Tenggara (Kejora) v Fajar Kenari Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-01(NCVC)(W)-414–10 OF 2014
ALIZATUL KHAIR, ABANG ISKANDAR AND NALLINI PATHMANATHAN JJCA
31 JULY 2017

Land Law — Alienation of land — Approval of — First respondent's application for re-alienation of project land rejected — Whether conduct or action of appellant led to rejection of first respondent's application for re-alienation of project land — Whether there was in fact and in law concluded contract between appellant and first respondent which required appellant to ensure alienation of land granted to first respondent

The appellant was authorised by the State Authority of Johor to act as the land administrator for Kota Tinggi/Kluang. Kejora Properties Sdn Bhd ('KPSB'), a subsidiary of the appellant, entered into a joint venture agreement whereby it was agreed that upon alienation of the project land to KPSB by the state authority, the development rights over the project land would be granted to the first respondent, a company incorporated pursuant to the joint venture agreement. On 25 March 1994, KPSB wrote a letter to the appellant informing the appellant that KPSB would develop the project land and it was requested that the appellant act as the land administrator for the said area to process the application for alienation of the project land. Then, the appellant submitted a working paper to the second respondent in relation to the approval application for the alienation of the project land to the first respondent for the approval of the MMK which was then approved by the state authority. The MMK, during its sitting on 19 December 2012, had decided to 'menolak rayuan permohonan akuan semula dan permohonan tanah PTB 2322 hingga PTB 4890 seluas 289.53 ekar Mukim Tanjung Surat, Daerah Kota Tinggi sebagaimana berlakar 'merah' pada pelan bagi Projek Perumahan Fasa 3, Bandar Penawar daripada Lembaga Kemajuan Johor Tenggara ('KEJORA'), Fajar Kenari Sdn Bhd dan Syarikat Iktikad Unggul Sdn Bhd'. Subsequently, the appellant wrote to the first respondent informing the first respondent regarding the MMK's decision to reject its appeal application. The first respondent filed a suit against the appellant and the second respondent. After the full trial, the learned High Court judge allowed the first respondent's claim against the appellant and dismissed the first respondent's claim against the second respondent. Dissatisfied with the decision, the appellant filed the present appeal. The issue to be determined was whether the conduct or action on the part of the appellant led to the rejection of the first respondent's application for the

re-alienation of the project land by MMK and whether there was in fact and in law a concluded contract between the appellant and the first respondent containing the terms and conditions which the appellant was alleged to have breached.

Held, allowing the appeal with costs of RM40,000, and setting aside the High Court's decision:

(1) In the absence of any other evidence, oral or documentary, it could not be presumed that the appellant was acting in pursuance of its contractual obligations when it notified the first respondent of the MMK's decision on 9 June 1999 via its letter dated 14 June 1999 (see para 56).

(2) DW1's evidence did not lend support to the High Court's finding of a principal-agent relationship between the first respondent and the appellant. Rather the evidence showed that the appellant was merely carrying out its duty as land administrator when it submitted the application for alienation of project land to the first respondent, to the MMK (see para 62).

(3) In the light of the finding that the learned judge was wrong in holding that there existed a concluded contract between the first respondent and the appellant, the learned judge's finding that the decision of the MMK to reject the first respondent's application for re-alienation was due to the appellant's action and that this action amounted to a breach of the latter's contractual obligation, was no longer relevant (see para 67).

(4) Apart from there being no evidence adduced to support the learned judge's finding that it was the appellant's duty and obligation to ensure that the alienation of the project land as approved by the MMK, should only be granted to the first respondent, the learned judge failed to take into consideration that it was legally and factually impossible for the appellant to fulfill such obligation (see para 68).

(5) The power to alienate the project land to the first respondent lay exclusively with the state authority. It was clearly stipulated in s 78(3) of the National Land Code, that until the name of the proprietor was registered on the register document of title, the state authority had all the power to deal with the state land including alienating the land to other parties and revoking any approval for alienation previously made, and where necessary refunding to payments already made upon issuance of notice in Form 5A (see para 69).

(6) No evidence was adduced to show that the appellant in its role as land administrator for the southeast region of Johore and in its capacity as the regional land administrator for Johor Tenggara was in a position to impose on the state authority or MMK that the project land be alienated exclusively to the first respondent (see para 70).

[Bahasa Malaysia summary

Pihak perayu telah diberi kuasa oleh Pihak Berkuasa Negeri Johor untuk menjadi pentadbir tanah bagi Kota Tinggi/Kluang. Kejora Properties Sdn Bhd ('KPSB'), sebuah anak syarikat pihak perayu, telah menandatangani satu perjanjian usahasama yang mana telah dipersetujui bahawa sebaik sahaja pemberimilikan tanah projek itu diberi kepada KPSB oleh pihak berkuasa negeri, hak pembangunan ke atas tanah projek itu akan diberikan kepada responden pertama, sebuah syarikat yang diperbadankan menurut perjanjian usahasama itu. Pada 25 Mac 1994, KPSB telah menulis surat kepada perayu memaklumkan bahawa KPSB akan membangunkan tanah projek itu dan pihak perayu diminta untuk menjadi pentadbir tanah bagi kawasan tersebut untuk memproses permohonan pemberimilikan tanah projek itu. Kemudian, pihak perayu telah mengemukakan kertas kerja kepada responden kedua berhubung dengan kelulusan permohonan pemberimilikan tanah projek itu kepada responden pertama bagi kelulusan MMK yang kemudiannya diluluskan oleh pihak berkuasa negeri. Pihak MMK, semasa mesyuarat pada 19 Disember 2012, telah memutuskan untuk 'menolak rayuan permohonan akuan semula dan permohonan tanah PTB 2322 hingga PTB 4890 seluas 289.53 ekar Mukim Tanjung Surat, Daerah Kota Tinggi sebagaimana berlakar 'merah' pada pelan bagi Projek Perumahan Fasa 3, Bandar Penawar daripada Lembaga Kemajuan Tenggara ('KEJORA'), Fajar Kenari Sdn Bhd dan Syarikat Iktikad Unggul Sdn Bhd'. Selanjutnya, pihak perayu telah menulis surat kepada responden pertama yang memaklumkan tentang keputusan MMK untuk menolak permohonan rayuannya. Pihak responden pertama memfailkan saman terhadap perayu dan responden kedua. Selepas perbicaraan penuh, Yang Arif Hakim Mahkamah Tinggi telah membenarkan tuntutan responden pertama terhadap perayu dan mengenepikan tuntutan responden pertama terhadap responden kedua. Tidak berpuas hati dengan keputusan itu, pihak perayu telah memfailkan rayuan ini. Isu yang perlu ditentukan ialah sama ada perbuatan atau tindakan perayu telah membawa kepada penolakan permohonan responden pertama untuk pemberimilikan semula tanah projek oleh MMK dan sama ada terdapat kontrak yang telah dimuktamadkan, dari segi fakta dan undang-undang, antara perayu dengan responden pertama yang mengandungi terma dan syarat yang dikatakan pihak perayu telah melanggarnya.

Diputuskan, rayuan perayu dibenarkan dengan kos sebanyak RM40,000, dan keputusan Mahkamah Tinggi diketepikan:

(1) Dalam ketiadaan keterangan lain, sama ada secara lisan atau dokumentar, ia tidak boleh dianggap bahawa pihak perayu telah bertindak mengikut obligasi kontraknya apabila ia memberitahu responden pertama tentang keputusan MMK pada 9 Jun 1999 melalui surat bertarikh 14 Jun 1999 (lihat perenggan 56).

(2) Keterangan SP1 tidak menyokong dapatan Mahkamah Tinggi tentang hubungan prinsipal dan ejen antara responden pertama dengan perayu. Sebaliknya, keterangan menunjukkan bahawa pihak perayu hanya melaksanakan tanggungjawabnya sebagai pentadbir tanah apabila pihak perayu mengemukakan permohonan pemberimilikan tanah projek itu kepada responden pertama, kepada MMK (lihat perenggan 62).

(3) Setelah mendapati bahawa hakim bijaksana telah khilaf apabila memutuskan bahawa terdapat kontrak yang dimuktamadkan antara responden pertama dengan perayu, dapatan hakim bijaksana bahawa keputusan MMK untuk menolak permohonan responden pertama untuk suatu pemberimilikan semula adalah akibat daripada tindakan perayu dan tindakan ini terjumlah kepada suatu pelanggaran obligasi kontrak oleh perayu, sudah tidak relevan lagi (lihat perenggan 67).

(4) Meskipun terdapat keterangan yang dikemukakan yang menyokong dapatan hakim bijaksana bahawa ia adalah tanggungjawab dan tugas perayu untuk memastikan pemberimilikan tanah projek itu, sebagaimana yang diluluskan oleh MMK, seharusnya hanya diberikan kepada responden pertama, hakim bijaksana telah gagal untuk mempertimbangkan bahawa adalah sangat mustahil, dari segi undang-undang mahupun fakta, bagi perayu untuk memenuhi tanggungjawab tersebut (lihat perenggan 68).

(5) Kuasa untuk memberi milik tanah projek itu kepada responden pertama terletak secara eksklusif kepada pihak berkuasa negeri. Ia dinyatakan secara jelas dalam s 78(3) Kanun Tanah Negara, bahawa pihak berkuasa negeri mempunyai semua kuasa untuk menguruskan tanah negeri termasuklah memberi milik tanah itu kepada pihak lain dan membatalkan mana-mana kelulusan untuk memberi milik yang telah dibuat sebelumnya dan memulangkan semula pembayaran yang telah dibuat apabila notis dalam Borang 5A dikeluarkan, jika perlu, sehinggalah nama tuan punya didaftarkan dalam daftar dokumen hakmilik (lihat perenggan 69).

(6) Tiada keterangan dikemukakan untuk menunjukkan bahawa pihak perayu, dalam bertindak sebagai pentadbir tanah bagi wilayah tenggara Johor dan dalam kapasitinya sebagai pentadbir tanah wilayah Johor Tenggara, mempunyai kuasa untuk memaksa pihak berkuasa negeri atau MMK memberi milik tanah projek itu secara eksklusif kepada responden pertama (lihat perenggan 70).]

Notes

For a case on approval of alienation of land, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) para 2723.

Cases referred to

Azman bin Mahmood & Anor v SJ Securities Sdn Bhd [2012] 6 MLJ 1; [2012] 6 CLJ 573, FC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

North East Plantations Sdn Bhd lwn Pentadbir Tanah Daerah Dungun & Satu Lagi [2011] MLJU 1529; [2011] 4 CLJ 729, FC (refd)

Legislation referred to

Lembaga Kemajuan Johor Tenggara Act 1972

National Land Code 1965 ss 12, 78(3), Form 5A

Appeal from: Civil No 21NCVC-11–11 of 2013 (High Court, Johor Bahru)

Abu Daud bin Abd Rahim (Farah Nadiah bt Zainudin with him) (Azmi & Assoc) for the appellant.

Loh Siew Cheang (Yap Mong Jay and Verene Tan with him) (Cheang & Ariff) for the first respondent.

Anis Wahidah bt Mohamad (Legal Advisor, Johor Bahru State Legal Advisor Office) for the second respondent.

Alizatul Khair JCA:

INTRODUCTION

[1] This appeal by the appellant, Lembaga Kemajuan Johor Tenggara ('KEJORA') (the first defendant in the High Court) arises out of the decision of the learned High Court judge in Johor Baru who had, after a full trial allowed the first respondent's (the plaintiff in the court below) claim against the appellant and dismissed the first respondent's claim against the second respondent (the second defendant in the court below). There is no cross-appeal by the first respondent against the dismissal of its claim.

[2] We heard the appeal wherein at the conclusion of the hearing we unanimously allowed it with costs of RM40,000 to the appellant. We set out below the reasons for our decision. The parties will be referred to as they were referred to in the High Court including the second defendant, although he is not a party to this appeal.

BACKGROUND

[3] The first defendant ('KEJORA') is a statutory body established under Lembaga Kemajuan Johor Tenggara Act 1972 (Act 75) as a regional development agency for the southeast region of Johor.

A **[4]** The first defendant is also authorised by the State Authority of Johor to act as the land administrator for Kota Tinggi/Kluang by virtue of *Warta Kerajaan Negeri Johor Bil 10 Jil 16 Tahun 1972* and s 12 of the National Land Code 1965.

B **[5]** To fully appreciate the factual background leading to this dispute it is perhaps necessary to set out the facts as set out in the parties' 'common chronology of facts' which we adopt for the purpose of this judgment, albeit, with some modifications.

C **[6]** On 1 October 1993, Kejora Properties Sdn Bhd ('KPSB'), a subsidiary of Kejora Holdings Sdn Bhd (a subsidiary of the first defendant) entered into a joint venture agreement with Remedy Properties Sdn Bhd and Ungku Jamilah Holdings Sdn Bhd whereby it was agreed that upon alienation of the
D project land to KPSB by the state authority, the development rights over the project land would be granted to Fajar Kenari Sdn Bhd ('the plaintiff'), a company incorporated pursuant to the joint venture agreement ('JV agreement').

E **[7]** On 25 March 1994, KPSB wrote a letter to the first defendant (in its capacity as land administrator of the area) informing the latter that KEJORA's Board of Directors' Meeting bil 2/92 had agreed that KPSB would develop the project land and requesting the first defendant as the land administrator for the said area to process the application for alienation of the project land.

F **[8]** On 18 January 1995, the first defendant wrote a letter to the land administrator (*pentadbir tanah daerah*) of the district of Kota Tinggi requesting the PTD No for the project land and suggestions and recommendation on the
G housing project.

[9] Prior to that, on 1 October 1994 following the decision of the federal government to privatise the first defendant, a sale and purchase agreement was entered into between the first defendant and Southern Integrated Agriculture
H Project Sdn Bhd ('SIAP') to award the privatisation of the first defendant's commercial activities to SIAP including its interest and liabilities in KPSB and the plaintiff.

I **[10]** On 31 May 1995, the first defendant submitted a working paper to the second defendant in relation to the approval application for the alienation of the project land to the plaintiff for the approval of the MMK.

The said application was approved by the state authority on 9 June 1999.

[11] On 3 August 1999, the second defendant wrote to the first defendant informing the latter that the MMK had approved the alienation of the project land to the plaintiff and to submit four copies of completed layout plans before final approval can be given.

[12] A similar letter was written by the second defendant to the land administrator of the district of Kota Tinggi on 12 March 2003 informing the latter of the state authority's decision and the requirement to submit four copies of completed layout plans before the issuance of final approval. This letter was copied to the first defendant and the plaintiff.

[13] Subsequently, the first defendant vide its letter dated 23 February 2006, informed the second defendant that its board of directors had agreed to cancel and revoke the application for the alienation of the project land to the plaintiff. In its place the first defendant had decided that the development of the project land be given to Iktikad Unggul Sdn Bhd.

[14] In the said letter, the first defendant explained that the cancellation and revocation of the approval of the alienation was because it had divested its shares in the JV company ie the plaintiff, following the federal government's decision to privatise its commercial activities (including its interest in the plaintiff).

[15] Thus on 16 May 2006, the first defendant forwarded a working paper ('the said application') through the second defendant for the MMK's approval, that the project land be alienated to the first defendant to be jointly developed with Iktikad Unggul Sdn Bhd.

[16] The said application was rejected by the MMK as conveyed to the first defendant by the second defendant vide the latter's letter dated 11 January 2005.

[17] The first defendant through the second defendant appealed to the MMK on 25 January 2007 to reconsider its decision but was informed by the second defendant on 5 June 2007 that its appeal had been rejected by the MMK on 23 May 2007.

[18] On 12 February 2010 the first defendant wrote a letter to the second defendant requesting that the award of the project land be returned to the plaintiff in accordance with the layout plans submitted to the second defendant on 15 June 2009.

A **[19]** Although the MMK had on 9 June 1999 approved the project land to be alienated to the plaintiff, a formal letter informing the terms and conditions of the said approval was only issued by the second defendant to the first defendant on 21 April 2010.

B **[20]** On 14 June 2010, the first defendant wrote to the plaintiff informing them of the MMK's decision on 9 June 1999 and the terms and conditions of the said approval. The first defendant requested the plaintiff to appoint a licensed land surveyor for the submission of the Form 5A.

C **[21]** Meanwhile on 5 October 2011, Iktikad Unggul Sdn Bhd appealed to the Chief Minister of Johor to reconsider the MMK's decision on 23 May 2007 which rejected its appeal that the project land alienated to the first defendant be jointly developed with Iktikad Unggul Sdn Bhd.

D **[22]** On 7 June 2012, total survey consultants, the licensed land surveyor appointed by the plaintiff, vide its letter of even date informed the first defendant that there was a reduction of 55 units from the pre-computation plan and that the second defendant had suggested that the first defendant submit a new working paper in accordance with the pre-computation plan E prepared by the surveyor.

[23] On 21 June 2012, the first defendant forwarded a working paper titled, inter alia, 'Rayuan permohonan semula sempadan tanah secara serah balik F kurnia semula ('SBKS') bagi tujuan pembangunan perumahan bercampur kepada Syarikat Fajar Kenari Sdn Bhd.' to the second defendant.

[24] On 7 September 2012, a meeting was held between the first defendant, the plaintiff and the second defendant to discuss the status of alienation of the G project land to the plaintiff, and it was agreed that the first defendant would make a resubmission of the working paper to the second defendant for the MMK's approval.

[25] On 13 September 2012, the first defendant presented to the second H defendant a working paper titled 'permohonan semula pecah sempadan tanah secara serah balik kurnia semula ('SBKS') di atas tanah seluas 289.53 ekar Fasa III, di Bandar Penawar, Mukim Tanjung Surat, Daerah Kota Tinggi, Johor bagi tujuan pembangunan perumahan bercampur' to be approved by the MMK.

I **[26]** Vide letter dated 9 January 2013, the second defendant informed the first defendant that the MMK during its sitting on 19 December 2012 had decided to 'menolak rayuan permohonan akuan semula dan permohonan tanah PTB 2322 hingga PTB 4890 seluas 289.53 ekar Mukim Tanjung Surat, Daerah Kota Tinggi sebagaimana berlakar 'merah' pada pelan bagi Projek

Perumahan Fasa 3, Bandar Penawar daripada Lembaga Kemajuan Johor Tenggara (KEJORA), Fajar Kenari Sdn Bhd dan Syarikat Iktikad Unggul Sdn Bhd'.

[27] On 31 January 2013, the first defendant wrote to the plaintiff informing the plaintiff of the decision of the MMK rejecting its appeal application.

[28] On 31 October 2013, the plaintiff filed a suit (the subject matter of this appeal) against the first and second defendants seeking, inter alia, the following reliefs:

(a) Deklarasi bahawa Defendan-Defendan dengan specifiknya melaksanakan obligasi-obligasi mereka untuk melakukan kesemua yang perlu dan membuat segala rayuan yang relevan dalam memperoleh kelulusan bagi memperoleh Tanah projek kepada Plaintif.

(b) Ganti rugi am bagi pelanggaran terma-terma nyata dan/atau tersirat perjanjian di antara Defendan Pertama dan Plaintif.

(c) Ganti rugi khas berpunca dari pelanggaran terma-terma nyata dan/atau tersirat surat kelulusan bertarikh 21.4.2010 dan perjanjian di antara Plaintif dan Defendan Pertama.

THE PLAINTIFF'S CASE

[29] As submitted by the plaintiff, the main thrust of their case against the first defendant is that the MMK's rejection of their application for the re-alienation of the project land was caused by the first defendant's actions and that the first defendant had breached its duty and obligation to the plaintiff to ensure that the alienation of the project land should only be granted to the plaintiff.

[30] This is reflected in para 15 of the plaintiff's amended statement of claim which reads as follows:

15. Plaintif menegaskan bahawa Defendan Pertama dan Defendan Kedua telah bersetuju dan mengesahkan bahawa Tanah Projek tersebut akan dikurniakan pada Plaintif. Akan tetapi, berdasarkan pada surat bertarikh 9.1.2013 dari Defendan Kedua kepada Defendan Pertama ia mengesahkan bahawa Defendan Pertama telah melanggari obligasi nyata telah membuat dua permohonan yang lain pengurniaan Tanah Projek tersebut bukan hanya berpihak pada Plaintif tetapi juga bagi Defendan Pertama sendiri dan Syarikat Pihak Ketiga dikenali sebagai Syarikat Iktikad Unggul Sdn. Bhd. Plaintif menegaskan bahawa *tindakan Defendan Pertama dan bertindak dalam memohon Tanah Projek tersebut dikurniakan kepada Defendan Pertama ie KEJORA dan Syarikat Pihak Ketiga ie Syarikat Iktihad Unggul Sdn Bhd telah dengan serious membahayakan (jeopardised) dan memperjudikan kelulusan untuk mengurniakan Tanah Projek tersebut kepada Plaintif* oleh Defendan Kedua

dan Majlis Mesyuarat Negeri. Plaintif menegaskan bagi alasan dari itu, *Defendan Pertama telah gagal untuk memenuhi obligasinya, terma-terma dan syarat-syarat di bawah perjanjian dengan Plaintif dan dengan niat jahat melanggari perjanjian di antara Defendan Pertama dan Plaintif*. (Emphasis added.)

[31] According to the plaintiff its claim as framed above gave rise to the following issues:

(a) whether the actions of the first defendant had caused the MMK to subsequently reject the plaintiff's application for re-alienation of the project land; and

(b) if so, whether the first defendant had breached its duty and obligation to the plaintiff when its actions prejudiced the original approval given to the plaintiff by the MMK on 9 June 1999.

[32] These issues, according to learned counsel for the plaintiff 'were very much factual disputes' and an appellate court would normally be very slow in interfering with the findings of facts of the trial judge unless the trial judge had misconstrued crucial evidence resulting in the uncertainty on one party's evidence and the consistency of the other party's evidence being disregarded (see *Azman bin Mahmood & Anor v SJ Securities Sdn Bhd* [2012] 6 MLJ 1; [2012] 6 CLJ 573 (FC); and *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 (FC) — a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal).

[33] In this regard, learned counsel submitted that the learned trial judge had made findings of facts based on contemporaneous evidence, in determining the two issues outlined above and there is therefore no basis for this court to interfere with the learned judge's findings.

Inter alia, the learned judge found as follows:

(a) the first defendant is the legal agent appointed to apply for alienation of the project land for and on behalf of the plaintiff;

(b) it is the first defendant's duty and obligation to ensure that the alienation of the project land as approved by the MMK on 9 June 1999 should only be granted to the plaintiff and to no other third party, least of all to the first defendant itself;

(c) the first defendant breached this duly and obligation when it made two other applications for alienation of the project land not only in favour of the plaintiff but also for itself;

(d) although there is no formal contract between the plaintiff and the first and second defendants, the letter dated 21 April 2010 from the second

defendant and the letter dated 14 June 2010 from the first defendant amounts to confirmation and tacit agreement between the plaintiff and the first defendant that the first defendant would be duty bound to obtain the state MMK approval for alienation of the project land to the plaintiff;

(e) the first defendant cannot be heard to say that as the land administrator it cannot be blamed for the MMK decision reversing its 9 June 1999 decision. Clearly it was due to its action that the decision was reversed;

(f) given its role and obligations vis a vis the plaintiff in the application process it is unacceptable for the first defendant to argue that it is the absolute powers of the MMK whether to revoke and approval given in respect of alienation of land to any party; and

(g) the plaintiff has established a concluded and existing contract between the plaintiff and the first defendant.

[34] Based on the aforesaid findings the learned judge gave judgment in favour of the plaintiff and ordered that:

> (a) Defendan Pertama dengan spesifikasinya melaksanakan obligasi-obligasi Defendan Pertama untuk melakukan kesemua yang perlu dan membuat segala rayuan yang relevan dalam memperoleh kelulusan bagi memperoleh Tanah Projek kepada Plaintif;

(a declaration that the first defendant specifically perform its obligations to do all that would be necessary and to submit all relevant appeals to obtain the approval for alienation of the project land to the plaintiff.)

It was further ordered by the learned judge as follows:

> ... bahawa Defendan Pertama membayar Gantirugi Am dan Gantirugi Khas berserta faedah di atas kerugian yang akan ditaksirkan berserta kos.

(the first defendant to pay general and special damages with interest for the loss which would be assessed and costs.)

THE FIRST DEFENDANT'S CASE

[35] The first defendant denied that there was any agreement between the plaintiff and the first defendant as regards the alienation of the project land to the plaintiff.

[36] The first defendant alleged that in response to the first defendant's denial of the existence of such agreement, the plaintiff pleaded that such agreement was actually the alleged agreement between the plaintiff and KPSB and the obligations of KPSB under the alleged agreement were assumed by the first defendant upon the privatisation of KPSB in 1994 (see para 4 of the first

defendant's statement of defence, at p 24 of the core bundle, (*Jld* 1)).

[37] In fact this was one of the issues to be tried, that is:

> IB Whether there was an agreement between the plaintiff and Kejora Properties Sdn Bhd and whether the first defendant had assumed all obligations of Kejora Properties Sdn Bhd upon the privatisation of Kejora Properties Sdn Bhd in 1994.

(see p 255 of the core bundle (*Jld* 1).)

[38] However, according to learned counsel for the first defendant this issue was abandoned by the plaintiff during trial and instead evidence was led to show that the first defendant had breached the terms and conditions of the letter dated 14 June 2010 by applying for the re-alienation of the project land on behalf of other parties (which was also one of the issues to be tried at the trial (see p 225).

[39] The first defendant contended that the learned judge had erred in allowing the plaintiff to depart from its pleaded case when he made the following finding of fact that the letter dated 21 April 2010 from the second defendant and the letter dated 14 June 2010 from the first defendant amounted to 'confirmation and undertaking and tacit agreement between the plaintiff and the first defendant that the first defendant would be duty bound to obtain state MMK's approval for alienation of the project land to the plaintiff'.

[40] In this regard argued counsel for the first defendant the learned judge erred in law and in fact in holding that there existed a contract between the plaintiff and the first defendant in respect of which the first defendant is obliged to ensure that the project land is approved and alienated to the plaintiff by the MMK and that the first defendant had breached the alleged contract when such finding was not supported by any evidence whether oral or documentary.

[41] Learned counsel for the first defendant further submitted that the learned judge's finding that the first defendant was the plaintiff's legal agent appointed to apply for the alienation project land for and on behalf of the plaintiff based purely on DW1's evidence was clearly erroneous in law and in fact.

OUR FINDINGS

[42] As stated earlier, we had, after hearing counsel's submission and after perusing the appeal records, concurred with the first defendant's submissions

and allowed the appeal with costs. The learned judge's decision was set aside and the plaintiff's claim was consequentially dismissed.

[43] Learned counsel for the plaintiff in his submission contended that the main thrust of the plaintiff's case against the first defendant is that the MMK's rejection of the application for re-alienation of the project land (to the plaintiff) was caused by the first defendant's actions and that the first defendant had breached its duty and obligation to the plaintiff to ensure that the alienation of the project land should only be granted to the plaintiff.

[44] In support of its case, the plaintiff set out the following facts which it contended led to the irresistible conclusion that it was the first defendant's deliberate conduct that had caused the MMK to reject the plaintiff's application for the re-alienation of the project land:

(a) though the first defendant was very much aware of the JV agreement and that the MMK had decided to alienate the project land only to the plaintiff, the first defendant, without informing the plaintiff, made an attempt to revoke and cancel the application for alienation of the project land to the plaintiff when it wrote to the second defendant on 23 February 2006. This request by itself would have seriously prejudiced the approval given to the plaintiff in 1999;

(b) the first defendant also made it clear to the second defendant of its intention to jointly develop the project land with Syarikat Iktikad Unggul Sdn Bhd when it appealed against the rejection of its application by MMK and requested for the project land to be alienated only to the first defendant instead;

(c) the first defendant only informed the plaintiff of the MMK's 1999 decision after its attempts to alienate the project land either to Syarikat Iktikad Unggul or to itself were unsuccessful;

(d) the first defendant, despite having full knowledge that the MMK had already rejected its application for the project land to be alienated to Syarikat Iktikad Unggul (to be jointly developed between them) and the first defendant's appeal that the land be alienated to the first defendant itself in 2006 and 2007 respectively, nevertheless took advantage of the working paper submitted to the second defendant on 13 September 2012 to slip in two out of three alternatives which would benefit the first defendant directly;

(e) the first defendant knew and agreed that it was supposed to only submit the working paper for the re-alienation of the project land to the plaintiff strictly pursuant to the MMK's decision given on 9 June 1999; and

(f) that instead of having only a single application made on behalf of the plaintiff in relation to the re-alienation of the project land, the MMK had, subsequent to its 9 June 1999 decision, received several applications for the alienation of the same project land to three different parties — the plaintiff, the first defendant and Syarikat Iktikad Unggul Sdn Bhd.

[45] In our view whether such conduct or action on the part of the first defendant led to the rejection of the plaintiff's application for the re-alienation of the project land by the MMK and if so, whether such conduct amounted to a breach of the first defendant duties and obligation under the alleged contract between the plaintiff and the first defendant can only be answered by determining at the outset the fundamental question underlying this whole appeal, ie — whether there was in fact and in law a concluded contract between the first defendant and the plaintiff containing the terms and conditions which the first defendant is alleged to have breached.

[46] As regards the existence of a contract between the plaintiff and the first defendant, the plaintiff had pleaded as follows in their amended statement of claim:

> 4. Plaintif menegaskan bahawa melalui surat bertarikh 25.3.1994, KEJORA Properties Sdn Bhd memaklumkan kepada Lembaga Pengarah Defendan Pertama bahawa KEJORA Properties Sdn Bhd telah diberi hak memajukan tanah di Fasa III Bandar Penawar, Mukim Tanjung Surat, Kota Tinggi (kemudian daripada ini dirujuk sebagai 'Tanah Projek') dan meminta KEJORA (Defendan Pertama) untuk memohon bagi permohonan untuk pengurniaan Tanah Projek tersebut daripada Defendan kedua melalui Mesyuarat Kerajaan Negeri.
>
> 5. Kemudiannya, satu perjanjian telah dimasuki di antara Plaintif dan Defendan Pertama untuk memberikan Plaintif hak yang tunggal dan eksklusif untuk memajukan Tanah Projek tersebut setelah mendapat kebenaran dari Defendan Kedua dan Majlis Mesyuarat Negeri dan pihak-pihak berkuasa yang relevan berkaitan dengan permohonan bagi pengurniaan Tanah Projek dari Defendan Pertama kepada Plaintif selaras dengan Mesyuarat yang telah diadakan di KEJORA HOLDINGS SDN BHD PADA 25.9.1994.
>
> 6. Terma-terma dan Syarat-syarat yang nyata dan tersirat dari perjanjian di antara Defendan Pertama dan Plaintiff adalah bahawa Defendan Pertama harus memohon dan mendapatkan pengurniaan Tanah Projek bagi pemajuan dan mengambil kesemua langkah-langkah untuk memperoleh dan mendapatkan pengurniaan Tanah projek tersebut menyokong Plaintif.
>
> 7. Defendan Pertama selaras dengan perjanjian di antara Plaintif dan Defendan Pertama telah mengisukan surat bertarikh 18.1.1995 kepada Defendan Kedua memohon Tanah Projek tersebut dikurniakan kepada Plaintif dan sesalinan surat bertarikh 18.1.1995 telah dimajukan kepada Plaintif menurut terma-terma dan syarat-syarat perjanjian di antara Plaintif dan Defendan Pertama.

[47] The learned judge found that:

> Although there is no formal contract between the plaintiff and the first and second defendants the letter dated 21 April 2012 from the second defendant and the letter dated 14 June 2010 from the first defendant amounts to confirmation and undertaking and tacit agreement between the plaintiff and the first defendant that the first defendant would be duty bound to obtain state MMK approval for alienation of the project land to the plaintiff.

[48] We were in agreement with learned counsel for the first defendant that the learned judge committed an error of law and/or in fact in making the above finding as His Lordship had misapprehended the contents of the documents.

[49] The letter dated 21 April 2012 was issued by the second defendant to the first defendant and was attached to the first defendant's letter of 14 June 2010 to the plaintiff.

[50] In essence the second defendant's letter of 21 April 2012 was to inform the first defendant of the MMK's decision on 9 June 1999 regarding the plaintiff's application for the alienation of the project land. The letter states, inter alia, as follows:

> ... Adalah dimaklumkan bahawa Majlis Mesyuarat Kerajaan Johor di mesyuaratnya pada 9.6.1999 telah menimbangkan Ringkasan Mesyuarat Bil 1227/99 telah mengambil keputusan bagaimana berikut: Majlis BERSETUJU tanah-tanah sebagaimana dibutirkan di bawah, Mukim Tanjung Surat, Kota Tinggi sebagaimana berlakar 'merah' pada pelan dikurniakan kepada FAJAR KENARI SDN BHD bagi tujuan tapak pembinaan Fasa III, Bandar Penawar dengan dikenakan bayaran dan syarat-syarat: ...

[51] Pursuant to the aforesaid letter, the first defendant wrote to the plaintiff on 14 June 2010 informing the latter of the MMK's decision and enclosing the second defendant's letter of 21 April 2010.

The letter of 14 June 2010 reads, as follows:

> Adalah dimaklumkan bahawa Majlis Mesyuarat Kerajaan Johor di mesyuaratnya pada 9.6.1999 sebagaimana Ringkasan Mesyuarat Bil 1227/99 telah mengambil keputusan bersetuju tanah tersebut di atas dikurniakan kepada FAJAR KENARI SDN BHD bagi tujuan tapak pembinaan Fasa III, Bandar Penawar. Bersama-sama ini disertakan salinan surat kelulusan daripada Pengarah Tanah dan Galian Johor Bil (19) dlm PTG V1/4/95 bertarikh 21 April 2010.
>
> Pihak tuan dengan ini adalah dipohon untuk melantik Jurukur Tanah Berlesen bagi menyediakan perkiraan Borang 5A Kanun Tanah Negara sebagaimana format yang disertakan.

[52] It was clear from the contents of the aforesaid letter, that the first defendant was merely conveying to the plaintiff the decision of the MMK on 9 June 1999 approving the alienation of the project land to the plaintiff upon the terms and conditions spelt out in the second defendant's letter of 21 April 2010.

[53] The first defendant was merely discharging its duty as the land administrator for the area in which the project land is situated when it issued the letter of 14 June 2010.

[54] As duly acknowledged by the learned judge, being the land administrator for that area, the first defendant was the only body authorised to apply for the alienation of land in the south east region of Johor with such applications required to be made through the office of the second defendant.

[55] These two letters were issued in the exercise of the first and second defendants' duties as land administrator and Pengarah Tanah dan Galian respectively. They could not, in the absence of any corroborative evidence setting out the terms and conditions of the alleged agreement, be construed as evidence of an agreement between the first defendant and the plaintiff under which the first defendant is 'duty bound to obtain state MMK approval for alienation of the project land to the plaintiff, as found by the learned judge'.

[56] In other words in the absence of any other evidence, oral or documentary, it could not be presumed that the first defendant was acting in pursuance of its contractual obligations when it notified the plaintiff of the MMK's decision on 9 June 1999 vide its letter dated 14 June 1999.

[57] The learned judge was, with great respect, plainly wrong when he concluded that the letter dated 21 April 2012 from the second defendant and the letter dated 14 June 2010 from the first defendant amounted to 'confirmation and undertaking and tacit agreement between the plaintiff and the first defendant that the first defendant would be duty bound to obtain state MMK approval for alienation of the project land to the plaintiff'.

[58] Further, para 4 of the plaintiff's reply to the first defendant's defence denying the existence of such a contract raises further doubt as to the existence of such an agreement. We reproduce below para 4 of the plaintiff's reply:

> 4. Dalam menjawab perenggan 4 Penyataan Pembelaan tersebut, *Plaintif menyatakan bahawa Perjanjian yang dikatakan tersebut adalah berikutan dengan Perjanjian di antara Plaintif dan Kejora Properties Sdn Bhd pada asalnya*. Setelah Kejora Properties diswastakan pada tahun 1994, segala urusan yang dikendalikan oleh Kejora Properties telah diagihkan dan diambil alih oleh Defendan Pertama. Maka Defendan Pertama menjadi pihak yang bertanggungjawab untuk

memajukan permohonan pengurniaan tanah projek bagi Plaintif tersebut dan juga mengambil alih tanggungjawab untuk menyempurnakan perjanjian di antara Kejora Properties dan Plaintif tersebut. Berikutan dengan itu, Defendan Pertama telah memajukan surat bertarikh 31.5.1995 kepada Defendan Kedua memohon pengurniaan tanah projek diberikan kepada Plaintif. (Emphasis added.)

[59] In this connection, we also agreed with learned counsel for the first defendant that the learned judge erred in law and/or in fact when His Lordship held that based on the evidence of the first defendant DW1 was the legal agent appointed to apply for alienation of the project land for and on behalf of the plaintiff.

[60] The particular excerpt of DW1's evidence in cross-examination relied on by the learned judge to support his finding is reproduced below:

Parthiban: Encik Salim, Question 14. Jelaskan secara am, berkenaan dengan kertas kerja tersebut. Ini adalah urusan untuk apa?

Salim: Ini untuk tujuan, diangkat kepada kerajaan untuk kelulusan MMK.

Parthiban: Kepada siapa? Kelulusan untuk siapa?

Salim: Kepada pemohon.

Parthiban: Pemohon itu siapa?

Salim: Pemohon adalah Kejora.

Parthiban: Di 16. Rujuk jawapan tuan, tadi yang mana beritahu, Kejora, meminta Kejora untuk mengendalikan proses permohonan. Dan kenapa permohonan kemudiannya dibuat untuk Fajar Kenari? Kenapa?

Salim: Permohonan bagi tanah-tanah Kejora untuk, pembangunan perumahan akan diluluskan kepada Kejora ataupun kepada syarikat usaha bersama yang telah dipersetujukan oleh lembaga pengarah.

Parthiban: Dan ini adalah, so Fajar Kenari di sini, kira plaintif yang memohon untuk diberikan?

Salim: Ya saya.

Parthiban: So segala urusan kamu adalah untuk mendapatkan kelulusan, kelulusan pada Fajar Kenari?

Salim: Fajar Kenari, ya saya.

Parthiban: Itu adalah tugas kamu?

Salim: Saya.

Parthiban: Dengan company ini. Soalan 19. Adakah tanggungjawab Kejora terhadap, apakah tanggungjawab Kejora terhadap Fajar Kenari? So

kamu ada katakan, tanggungjawab Kejora hanya adalah untuk mengendalikan proses permohonan kelulusan berkaitan dengan pihak berkuasa dan Jabatan berkaitan, Kejora tidak mempunyai apa-apa kepentingan dalam. Tanggungjawab, sama ada pemaju ingin membuat bangunan-bangunan. So inilah tugas kamu, kamu confirmkan lagi sekali, tugas kamu adalah untuk mendapatkan permohonan kurniaan itu, pada Fajar Kenari. Betul?

Salim: Betul.

[61] However a perusal of DW1's evidence further on during cross-examination would reveal that the evidence of DW1 relied on by the learned judge (above) was taken out of context. This was DW1's further testimony in cross-examination on this issue:

Parthiban: Dalam soalan 20 you katakan, adakah perjanjian dimasuki antara Fajar Kenari dengan Kejora? Kamu kata tidak. Kejora tidak pernah memasuki dengan Fajar Kenari. Tak apa. Ok. Kalau kata, kamu kata tidak. Kenapakah kamu uruskan segala-gala perlantikan, kamu, untuk buatkan semua kerja permohonan semua, untuk Fajar Kenari, kenapa?

Salim: *Sebagai, pentadbir tanah Kejora. Tanggungjawab Kejora ialah memproses, permohonan-permohonan tanah yang telah kita terima dan diluluskan oleh pengarah, untuk kita angkat kepada pengarah tanah dan galian, dan seterusnya akan diluluskan oleh kerajaan negeri melalui MMK dan kita akan mengeluarkan Borang 5A dan seterusnya mendaftar hak milik tanah*.

Parthiban: So, walau apa, sekali kata pun, kamu, kamu bersetuju untuk buatkan permohonan untuk Fajar Kenari?

Salim: *Memang tugas saya untuk menyelesaikan permohonan-permohonan tanah yang kita terima di Kejora*. (Emphasis added.)

[62] Viewed as a whole, DW1's evidence did not lend support to the High Court's finding of a principal-agent relationship between the plaintiff and the defendant. Rather the evidence showed that the first defendant was merely carrying out its duty as a land administrator when it submitted the application for alienation of project land to the plaintiff, to the MMK.

[63] Other than the evidence of DW1, which as seen above was taken out of its proper context the plaintiff did not produce any evidence to show the manner and when the first defendant was appointed by the plaintiff as the legal agent for the purpose of alienation of the project land to the plaintiff.

[64] Thirdly, on the issue of whether the first defendant's actions or conduct (see para [45]) had caused the MMK to reject the plaintiff's application for the

re-alienation of the project land, the learned judge was of the view that the MMK's decision was clearly attributable to the first defendant's action in submitting three alternatives in its working paper to the MMK pursuant to the latter's decision of 9 June 1999, viz:

(1) The land to be alienated to the first defendant;

(2) The land to be alienated to the first defendant and the first defendant be allowed to develop the project jointly with the plaintiff as a joint-venture project;

(3) The land to be alienated to the plaintiff as per the MMK decision on 9.6.1999.

(see p 6 of the core bundle (*penghakiman*) and pp 513–514, core bundle (*Jld* (2)).

The learned judge then went on to hold that in doing so the first defendant had breached the alleged contract between the plaintiff and the first defendant.

[65] The learned judge's finding that the MMK's decision to reject the plaintiff's application for re-alienation of the project land was due to the action of the first defendant as set out above is in our view clearly unsustainable. No evidence was adduced before the learned judge to show the basis for the MMK's decision on the 19 December 2012.

[66] The '*Ringkasan Mesyuarat Bil* 2526/2012' deliberated by the MMK at its meeting on 19 December 2012 was also not adduced as evidence. In the absence of such evidence and without any evidence to show the basis of the decision of the MMK on 19 December 2012, we concurred with the first defendant that the finding of the learned judge implicating the first defendant for the MMK's decision was 'nothing more than an assumption of fact unsubstantiated by evidence'.

[67] In any event, in the light of our finding that the learned judge was wrong in holding that there existed a concluded contract between the plaintiff and the first defendant, the learned judge's finding that the decision of the MMK to reject the plaintiff's application for re-alienation was due to the first defendant's action and that this action amounted to a breach of the latter's contractual obligation, is no longer relevant.

[68] For completeness we would add that quite apart from there being no evidence adduced to support the learned judge's finding that it is the first defendant's duty and obligation to ensure that the alienation of the project land as approved by the MMK on 7 June 1999, should only be granted to the plaintiff, the learned judge failed to take into consideration that it was legally and factually impossible for the first defendant to fulfill such obligation.

[69] Firstly, the power to alienate the project land to the plaintiff lies exclusively with the state authority. It is clearly stipulated in s 78(3) of the National Land Code, that until the name of the proprietor is registered on the register document of title, the state authority ('the MMK') has all the power to deal with state land including alienating the land to other parties and revoking any approval for alienation previously made, and where necessary refunding the payments already made upon issuance of notice in Form 5A (see *North East Plantations Sdn Bhd lwn Pentadbir Tanah Daerah Dungun & Satu Lagi* [2011] MLJU 1529; [2011] 4 CLJ 729).

[70] Secondly, contrary to the learned judge's finding in para 10 of his judgment, no evidence was adduced to show that the first defendant in its role as land administrator for the south east region of Johore and in its capacity as the Regional Land Authority for Johor Tenggara was in a position to impose on the state authority or MMK that the project land be alienated exclusively to the plaintiff.

CONCLUSION

[71] For the reasons set out above we were constrained to allow the appeal and set aside the learned judge's decision. We also awarded costs to the appellant and ordered that the deposit be refunded.

Appeal allowed with costs of RM 40,000; High Court's decision set aside.

Reported by Jacqueleen Kho